



(31)

Office - Supreme Court, U. S.

FILED

FEB 27 1943

CHARLES ELMORE COPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 771

BERTHA MALONE,

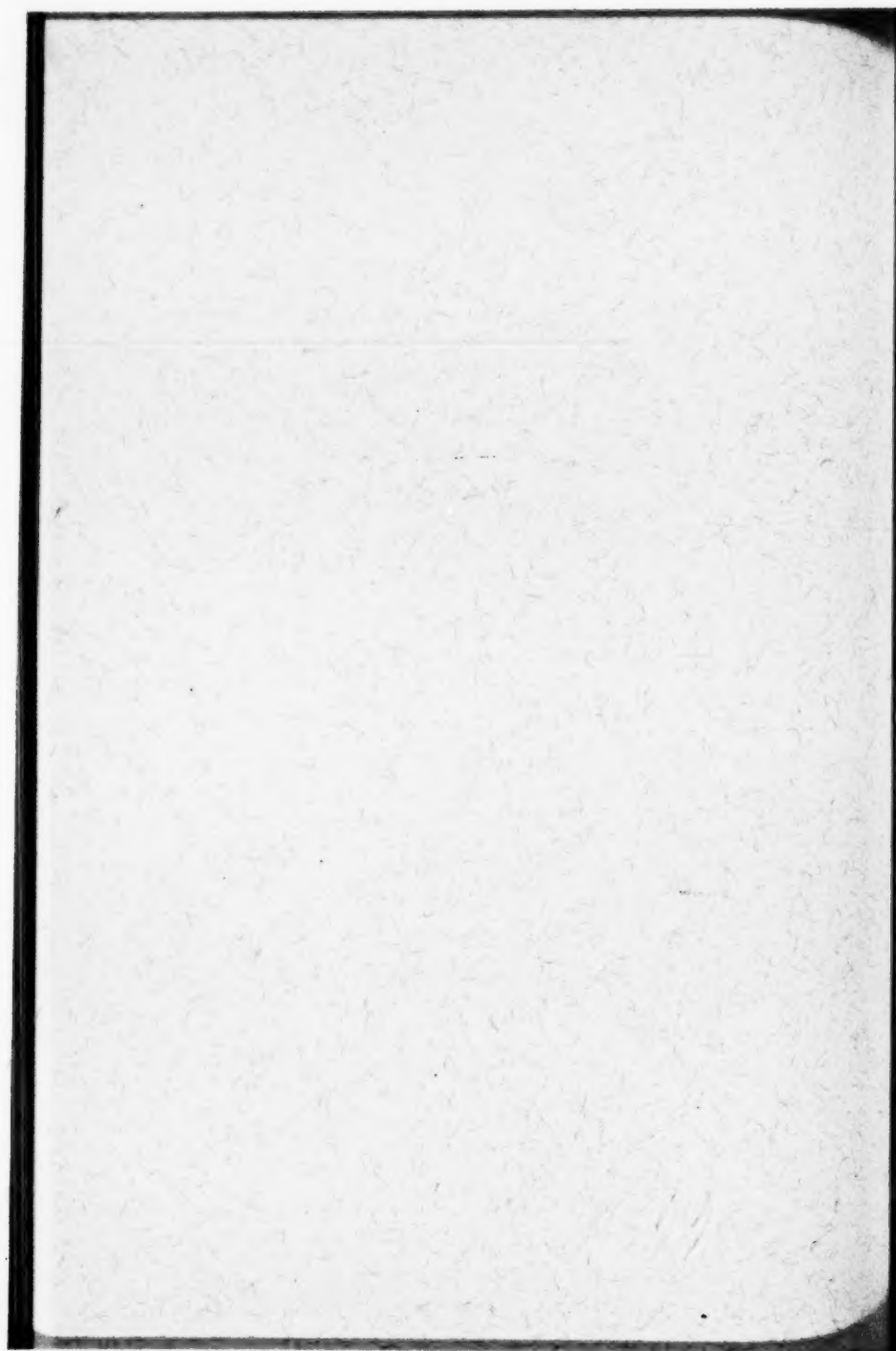
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN.

WILLIAM E. LEAHY,
NICHOLAS J. CHASE,
Counsel for Petitioner.



INDEX.

SUBJECT INDEX.

	Page
Petition for writ of certiorari.....	1
Summary statement of matter involved.....	1
Basis of jurisdiction	5
Questions presented	6
Reasons for allowance of the writ.....	7
Prayer for writ	8



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 771

BERTHA MALONE,

vs.

Petitioner,

THE PEOPLE OF THE STATE OF MICHIGAN.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN.**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Petitioner respectfully presents:

I.

Summary Statement of Matter Involved.

Bertha Malone, the Petitioner, was named as a conspirator in an information charging a conspiracy to obstruct justice filed December 12, 1940, in the Circuit Court of Wayne County, Michigan (R. 28). The information charged that petitioner and others allegedly operated houses of ill-fame and as such allegedly "by their agents or employees" paid certain public officials money, gifts and gratuities for the privilege of operating (R. 39, 40). After a trial extending over a three months' period, the Petitioner and other

private citizens and public officials were convicted on the second count of this information. Petitioner was sentenced to imprisonment for a period of 4½ to 5 years and to pay a fine of \$2,000 (R. 1995).

Petitioner appealed to the Supreme Court of the State of Michigan which affirmed the judgment and sentence. It is this judgment which is now sought to be reviewed.

During the course of the trial, the State sought to paint a roseate picture by calling in as witnesses every available gambling house operator, prostitute and person of equal station. The State sought to establish that Petitioner owned a house of prostitution and that she had entered into an agreement with certain public officials, co-defendants, whereby she would be permitted to operate a house of ill-fame as long as she paid protection money. Assuming *arguendo* that Petitioner owned a hotel in which a house of prostitution was maintained, the proof at the trial failed to show any knowledge in Petitioner that protection money was being paid. The proof was undisputed that Petitioner lived in Florida for the greater part of the period of time involved, owned properties in Detroit and had other business interests there. The proof was further undisputed that one Hattie Miller was paid by Petitioner to maintain and operate the hotel, restaurant, bar, etc. The Government then sought to show that protection money had been paid by the said Hattie Miller to one Elik Gell, a *dead man*. Hattie Miller denied that she paid any money to anyone for protection. She denied paying any money to the *dead man* in his life time. Hattie Miller stated that she paid \$900 to \$1100 each month as expenses, the said monies being paid to Ida Herman and Charley Berman (R. 1112). In making her accounting to the Petitioner, Hattie Miller stated:

“This \$900 to \$1100 was on the expense slip when I sent it to Bertha Johnson. I did not say to whom that money

was paid each month. I just put it down as expense. Bertha Johnson never objected to me because I deducted from \$900 to \$1100 monthly as expenses" (R. 1112).

On no less then four or five places in the Record the said Hattie Miller stated:

"At no time did I ever have any conversation with Bertha Johnson that I had to pay for protection" (R. 1147, 1119).

Under the Government's theory of the case there were two men who allegedly collected protection money for the prosecuting attorney and the sheriff, to wit, Sam Block and Gus Pines. Counsel have combed the Record and not a scintilla of testimony can be found wherein either of these men claimed that they received money from Hattie Miller or the Petitioner, notwithstanding that both men were granted immunity and testified for and in behalf of the State. Ida Herman and Charley Berman did not testify and Elik Gell was dead. On this state of the evidence it is difficult to understand how Petitioner could possibly be said to have conspired with certain public officials to obstruct justice. The fact of the matter is that not only was there no evidence of any participation in the alleged conspiracy by the Petitioner, but there was not even a reasonable inference thereof. From the state of the Record it would appear that it was the purpose of the prosecution to ruin the defendants who were public officials by showing that they were in league with certain asocial forces and, conversely, to convict Petitioner and others by showing that they engaged in illicit business and that therefore they must have paid protection money in order to do it. The voluminous Record in this conspiracy trial goes to show just what can be accomplished in a three months' trial wherein some twenty

defendants are named in an indictment, an indictment charging a "conspiracy to obstruct justice."

In sum, if it be admitted for the purpose of argument that Petitioner had retained Hattie Miller to operate the hotel and that she knew that Hattie Miller permitted prostitutes to carry on their profession therein, that is a long way from proving that Petitioner engaged in a conspiracy whereby she agreed with others to pay protection money in order that the prostitutes might be permitted to operate in her hotel.

The Court Below wrote an Opinion in this case, (R. 2211) the gist of which is that Petitioner is termed "a bawdy-house keeper" and then makes reference to opinions in companion cases (R. 2169-75; 89-90; 96).

During the course of the trial, certain fundamental errors were committed by the prosecution, which errors were assigned on appeal to the Court Below (R. 13-17). Some of these errors were also complained of by co-defendants, Duncan C. McCrea, Thomas C. Wilcox, Eddie Way, Ben Landsberg, Louis Elliott and Clyde Stambaugh. McCrea has filed in this Honorable Court a Petition for Writ of Certiorari, the same being No. 651, October Term, 1942, and the others have likewise petitioned this Court for a Writ, the same being Nos. 738-742, October Term, 1942.

The present Petitioner asserted specifically that: (1) There was a denial of a federal right in that the preliminary examination was conducted by a State Judge who had indicted the Petitioner while sitting as a one-man Grand Jury and prejudged the issue of probable cause (R. 14); (2) There was no trial at all since the petit jury, while deliberating, unlawfully was given certain volumes of the unauthenticated transcript of testimony, without authorization of the Court or consent of counsel (R. 16);

(3) There was a denial of a fair trial in that certain exhibits were submitted to the jury without the knowledge or consent of defense counsel (R. 17); and (4) The panel and array of petit jurors from which the jury was selected was illegally constituted in derogation of Petitioner's state and federal constitutional rights (R. 2013-2016, 2017).

There is also involved in the present Petition the independent question of whether or not the conviction of Petitioner as a conspirator in a conspiracy to obstruct justice without proof in the evidence of her connection with or knowledge of the alleged conspiracy is not a denial of liberty under the Fourteenth Amendment. Petitioner appreciates that this Court will ordinarily not review evidence and that the verdict of the jury ordinarily forecloses that question; however, it is respectfully submitted that where the allegation is made by a petitioner in this Court that a State has not proven petitioner guilty of the crime charged that this Court should intervene in order that justice may be served. We say this fully mindful of certiorari practice as it has developed and grown in the past twenty-five years.

II.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 237 (b) of the Judicial Code as amended on the ground that Petitioner has been deprived of Due Process of Law and the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The judgment to be reviewed is the judgment of the Supreme Court of the State of Michigan, entered on the 16th day of December, 1942 (R. 2211), affirming the judgment of the Circuit Court for the County of Wayne,

Michigan entered on the 14th day of May, 1941 (R. 1995). Motion for rehearing was submitted and denied (R. 2209). Two Stays of Execution were granted by the Court Below (R. 2209) and this Honorable Court granted a further Stay of Execution provided that the present Petition be filed by February 28, 1943.

III.

Questions Presented.

At the outset it is respectfully submitted that the present Petition involves a criminal case wherein the State failed to prove the crime charged. The State of Michigan through a so-called one-man grand jury endeavored to make out the crime of conspiracy to obstruct justice by corraling certain public officials with certain asocial personalities and thereby sought to infer that in return for protection money these public officials agreed that illicit business might flourish in Wayne County, Michigan. The present Petitioner, who was not even in Detroit during the period of time covered by the indictment, has been rather freely called a "bawdy house keeper" (R. 2210). At the trial the State was unable to show by any proof, direct or indirect, that Petitioner agreed to pay anyone any money in order that she might operate a house of prostitution. The Record may be culled and combed and the *legal* proof is just not there. No person in this democracy ought to be sent to prison unless he or she is guilty of a crime charged in an indictment and proved out at a trial. We respectfully submit that if a Writ issue in the present cause it can be convincingly demonstrated that the Petitioner has been denied the liberty guaranteed to her under the Fourteenth Amendment.

Petitioner respectfully directs the attention of this Court to the fact that Petitions for Writs of Certiorari have been

filed by six other co-defendants. Certain questions raised in those Petitions apply likewise to the present Petition. It is true that certain questions raised in the Petition of Duncan C. McCrea were not preserved in the Trial Court as to the present Petitioner or were not germane to her defense. This is true also as to certain of the questions raised in the Petition of Wilcox, et al., Nos. 738-742, October Term, 1942.

Insofar as the Petitions overlap, Petitioner does not propose to burden this Court with a reiteration of the questions presented.

As to the present Petitioner, the following points were preserved and raised in the Court Below: (1) The exclusion from the petit jury panel of qualified electors who were not registered voters and the general violation of the Statutes relating to the selection of a jury; (2) That the jury while deliberating was interfered with by a deputy sheriff and given certain testimony embodied in the unauthenticated transcript without the knowledge or consent of the Trial Judge or counsel; (3) That the proceedings by the one-man grand juror were illegal and unlawful, particularly in that the grand jury sat as the preliminary hearing magistrate.

IV.

Reasons for the Allowance of the Writ.

The public importance of the constitutional questions posed in the present Petition have been set forth in the Petition for Writ of Certiorari filed by Duncan C. McCrea, No. 651, October Term, 1942. The questions involved are discussed in the McCrea Petition aforesaid as well as in the Petition of Wilcox, et al., Nos. 738-742, October Term, 1942. To reiterate, several questions are presented in the McCrae Petition and in the Wilcox Petition, respectively, which do not appertain to the present Petition. However, insofar as

the Petitions overlap, the significance of the questions presented in the present Petition are fully discussed in the McCrae Petition. Because of the importance of the questions presented, it is felt that a review of the instant case would be also appropriate.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Michigan, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of proceedings herein; and that the Judgment of the Supreme Court of the State of Michigan be reversed by this Honorable Court, and your Petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

WILLIAM E. LEAHY,
NICHOLAS J. CHASE,
Counsel for Petitioner,
Bowen Building,
Washington, D. C.

